IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

THURSDAY, THE 4TH OCTOBER 2007 / 12TH ASWINA 1929

RSA.No. 517 of 2004()

AS.254/2001 of DISTRICT COURT, KOTTAYAM
OS.510/1998 of ADDL. MUNSIFF COURT, KOTTAYAM
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APPELLANTS/APPELLANTS/DEFENDANTS:
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1. **SIVAN, AGED 56 YEARS,**
   THAIPARAMBIL HOUSE, NEAR NARIMATTAM DEVI TEMPLE,
   THIRUVANCHOOR P.O., MANARCADU VILLAGE,
   KOTTAYAM TALUK.

2. **VALSAMMA K.V., W/O. V.N.SIVAN,**
   AGED 47 YEARS, THAIPARAMBIL HOUSE,
   MANARCADU VILLAGE.

3. **SANTHOSH T.S., S/O. V.N.SIVAN,**
   AGED 24 YEARS, THAIPARAMBIL HOUSE,
   MANARCADU VILLAGE.

4. **SUBHASH, S/O. V.N.SIVAN,**
   THAIPARAMBIL HOUSE, MANARCADU VILLAGE.

BY ADV. SRI.MATHEW PHILIP EDAPPALLIL

RESPONDENT: RESPONDENT/PLAINTIFF:

NARAYANAN, S/O. ANANDAN,
AGED 54 YEARS, CHIRAKUZHIYIL HOUSE,
NEAR NARIMATTOM DEVEI TEMPLE, THIRUVANCHOOR P.O.,
MANARCADU VILLAGE.

BY ADV. SRI.SURIN GEORGE IPE

THIS REGULAR SECOND APPEAL HAVING COME UP FOR ADMISSION ON 04/10/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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R.S.A.No. 517 OF 2004

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DATED THIS THE 4th DAY OF OCTOBER, 2007

JUDGMENT

Defendants in O.S.510 of 1998 on the file of Munsiff Court, Kottayam are the appellants. Respondent is the plaintiff. Respondent instituted the suit seeking a decree for permanent prohibitory injunction. Appellants in the written statement contended that they have a right of way by easement of prescription through the plaint schedule property.

2. Learned Munsiff found that no way was in existence at the time of institution of the suit. Therefore holding that the suit is only for injunction, a decree for injunction was granted in favour of respondent. Appellants filed A.S.254 of 2001 with an application filed under Section 5 of Limitation Act to condone a delay of 297 days in filing the appeal. Learned District Judge, disbelieving the medical certificate produced, dismissed the application holding that there is no sufficient ground to condone the inordinate delay of 297 days. Appeal was consequently dismissed as barred by time. It is challenged in the second appeal.

3. Learned counsel appearing for the appellants was heard.

The argument of learned counsel was that though the suit is one for injunction, when the appellants contended that they have a right of way by easement of prescription, trial court should have considered the question in view of the decision of this court in **Unnikrishnan V. Ponnu Ammal** (1999(1)KLT 298) and the decree is unsustainable. Learned counsel argued that first appellate court should have admitted the appeal after condoning the delay.

4. On hearing the learned counsel, I do not find any substantial question of law involved in the appeal. Even though appeal was filed belatedly, with an application under Section 5 of the Limitation Act, learned District Judge, on appreciation of materials produced, found that no sufficient reason was shown to condone the inordinate delay. Even if it is taken that first appellant was laid up as claimed by appellants, appellants 3 and 4 are major sons through whom an appeal could have been filed. No explanation was offered why an appeal was not filed by directing appellants 3 and 4 to take steps. The medical certificate produced show that before the expiry of the period of limitation, first appellant was discharged from the hospital. In such circumstances, appeal could have been filed through

appellants 3 and 4. First appellate court in such circumstances dismissed the application for condoning the delay. Even on merits, I do not find any substantial question of law involved in the appeal. As suit was only for injunction and on the evidence it was found that no way exist on the date of institution of the suit, respondent is entitled to the decree. As the plea of right of easement by prescription was not decided, appellants are at liberty to claim the right in an appropriate suit.

Appeal is dismissed in limine.

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-